Supreme Court, U.S.
FILED
FEB 6 1995
OFFICE OF THE CLERK

No. 94-1012

In the Supreme Court of the United States

OCTOBER TERM, 1994

MANVILLE SALES CORPORATION AND
MANVILLE CORPORATION, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the district court's exclusion from the evidence at trial of age-based remarks made by a participant in an allegedly discriminatory discharge decision was an abuse of discretion that substantially affected the rights of respondents.

2. Whether the court of appeals erred in holding that a special interrogatory that improperly focused the jury's attention on the general business decision to reorganize certain sales territories, rather than on the specific decision to select respondent for termination, so misled the jury as to require reversal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 27 F.3d 1089. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1994. A petition for rehearing was denied on September 6, 1994. Pet. App. 18-19. The petition for a writ of certiorari was filed on December 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Charles Mitte had sold building materials for petitioners since 1962. Pet. App. 2. In 1982, Lonnie Morris became District Manager of the district that included Mitte's sales territory. *Id.* at 3. As part of a company-wide effort to enhance productivity and reduce costs, Morris recommended to General Sales Manager Robert Bruntrager that petitioners eliminate one of the three sales representative positions in Morris's district, and divide the territory of the discharged salesperson between the remaining representatives. *Ibid.*

Morris recommended to Bruntrager that Mitte, then age 55, be dismissed, in favor of retaining younger employees. Pet. App. 2. In his recommendation, Morris specifically contrasted Mitte's age with that of a different salesperson, whom Morris described as a "young aggressive sales rep." *Ibid.* In January, 1986, Bruntrager followed Morris's recommendation and approved Mitte's discharge. *Ibid.*

Respondents Mitte and Equal Employment Opportunity Commission (EEOC) filed suit against petitioners under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, alleging discriminatory discharge based on age. Pet. App. 4. Petitioners argued that financial difficulties required a reduction in workforce, and that they selected Mitte for discharge because he was the least effective sales representative in his area. *Ibid.* Respondents did not dispute the economic necessity of a workforce reduction, but sought to prove that Mitte consistently outsold the other salespersons before his discharge, and that age actually motivated the termination decision. *Ibid.*

At trial, respondents attempted to introduce testimony from several witnesses that, during the four-year period when Morris supervised Mitte, Morris "remarked that Mitte was incapable; that he was old and inflexible; that Morris had bragged about 'how he jumped that old man about smoking his pipe'; that he pulled down Mitte's hat and said 'old man hat,'" and that such comments "exemplified the general tone of Morris's statements on the subject of age." Pet. App. 6-7. The district court granted petitioners' motion to exclude this testimony. *Id.* at 4.

Respondents also objected to a special interrogatory in the district court's jury charge. The interrogatory asked:

> Do you find from a preponderance of the evidence that the defendants, through the conduct and statements of its officers, agents and employees, discriminated against the plaintiff on account of his age when the defendants realigned the Texas sales territories?

Pet. App. 5. The court instructed the jury that a negative answer to this question ended their deliberations, and admonished the jury to refrain from answering further interrogatories if their response to this initial inquiry was "We do not." *Ibid.* The jury answered "We do not." to the special interrogatory, and the trial court entered judgment for petitioners. *Ibid.*

2. The court of appeals reversed and remanded. Pet. App. 1-17. The court held that the district court's exclusion from evidence of age-related comments by Mitte's supervisor was "an abuse of discretion" that "affected [respondents'] substantial rights" and required reversal. *Id.* at 11-12. Morris's age-based remarks, the court ruled, "are obviously relevant to a showing of age

bias on the part of a key figure in the decision to terminate Mitte and as such are admissible." *Id.* at 7-8.

The court also held that the trial court significantly misstated the law in its special interrogatory. The special interrogatory, the court concluded, erroneously required the jury to find in favor of petitioners only if it concluded that there was "discrimination in the general decision to realign the territory instead of in the specific decision to terminate Mitte." Pet. App. 15. Viewing the charge as a whole, the court was left "with [a] substantial and ineradicable doubt whether the jury ha[d] been properly guided in its deliberations," and therefore held that the erroneous interrogatory provided a second basis for reversal. *Id.* at 16-17 (quoting *Pierce* v. *Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985)).

ARGUMENT

1. Petitioners argue that the court of appeals erred in reversing the district court's exclusion of Morris's remarks. This contention is without merit.

Although "stray remarks" are ordinarily insufficient, by themselves, to establish discrimination, remarks by decisionmaking officials "can certainly be evidence" that impermissible bias motivated an employment decision. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989); *id.* at 277 (O'Connor, J., concurring). Thus, "stray remarks" are admissible at trial, even when they do not independently prove discrimination. See *Cone* v. *Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994); *Hong* v. *Children's Mem. Hosp.*, 993 F.2d 1257, 1265 (7th Cir. 1993); *Atkin* v. *Lincoln Property Co.*, 991 F.2d 268, 272 (5th Cir. 1993); *Leichihman* v. *Pickwick Int'l*, 814 F.2d 1263, 1271 (8th Cir.), cert. denied, 484 U.S. 855 (1987).

Moreover, the district court did not exclude Morris's remarks because they were irrelevant, stray or remote. Rather, it excluded the testimony because it could not determine whether the term "old man" was intended to be "endearing" or "discriminatory." C.A. R.E. Tab 6., at 114. As the court of appeals correctly held, however, the meaning of the term "old man" as used by Morris was a factual question for the jury to resolve. Pet. App. 8 n.2.

The court of appeals correctly concluded that no legal grounds existed for the district court's exclusion of testimony about Morris's remarks. The remarks directly referenced Mitte's age.[1] They were made by Mitte's supervisor during a four-year period, the entire period of time during which Morris supervised Mitte, and indicate "a pattern of discriminatory comments." Pet. App. 9. In terminating Mitte, Bruntrager admittedly relied on Morris's recommendation. *Ibid.* See *Wilson* v. *Monarch Paper Co.*, 939 F.2d 1138, 1146 (5th Cir. 1991). Thus, the statements were not "stray" or remote, but were "directly relevant" to determining whether the decision to discharge Mitte was motivated by discriminatory bias. Pet. App. 11.[2]

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[1] Even indirect comments, however, are probative. See *Bienkowski* v. *American Airlines*, 851 F.2d 1503, 1507 & n.4 (5th Cir. 1988) (refusing "to assume that indirect comments about [plaintiff's] age and adaptability are not possibly probative of an unlawful discriminatory intent").

[2] Petitioners also argue that the court of appeals failed to recognize the district court's "broad discretion" to weigh the probative value of evidence against its prejudicial effect under Fed. R. Evid. 403. Pet. 16-17. However, the district court did not balance the competing considerations under Rule 403, and thus the court of appeals was not required to defer to the district court's judgment on that issue.

2. Petitioners also contest the court of appeals' conclusion that the special interrogatory, when read in the context of the charge as a whole, misstated the law to such an extent as to require reversal. This claim also is without merit.

In reduction in force cases, the proper inquiry in evaluating a claim of discriminatory discharge must focus on why the plaintiff, rather than a different employee, was discharged, and not on whether an employer was justified in implementing a general workforce reduction. *Robinson* v. *PPG Indus.*, 23 F.3d 1159, 1163 (7th Cir. 1994); *Gallo* v. *Prudential*, 22 F.3d 1219, 1226 (2d Cir. 1994); *Washington* v. *Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993).

The interrogatory in this case required the jury to find for petitioners only if it found discrimination in petitioners' general decision to realign Mitte's territory. The interrogatory incorrectly failed to require that the jury determine whether the specific decision to terminate Mitte was motived by discriminatory animus. See *Thornbrough* v. *Columbus & Greenville R.R.*, 760 F.2d 633, 644 (5th Cir. 1985). The court of appeals thus held that the instruction was legally erroneous.[3]

[3] Although petitioners claim that the court of appeals failed to apply the proper standard of review and thereby "depart[ed] from Fifth Circuit precedent," Pet. i, the court of appeals applied the legal standard urged by petitioners. See Pet. App. 16-17 ("[a] substantial and ineradicable doubt whether the jury ha[d] been properly guided in its deliberations") (quoting *Pierce*, 753 F.2d at 425); Pet. 28 (identifying proper standard as whether "the charge as a whole creates a substantial and eradicable [*sic*] doubt whether the jury has been properly guided in its deliberations"). In any event, any inconsistency in Fifth Circuit decisions would be a matter for that court, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Furthermore, while petitioners are correct that the instruction must be examined in the context of the charge as a whole, "the impact of the interrogatory's particular misstatement of the law was enhanced by the fact that a negative answer to the question terminated the jury's inquiry and obliged the trial court to enter judgment for [petitioners]." Pet. App. 16. Thus, in this case the other elements of the charge amplified, rather than diminished, the harm of the error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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